The Canonist Vol 11 No 2 84 - 108

# The Introductory Phase of the Marriage Nullity Process and the Rights of the Parties

Merlin Ambrose*

## Introduction

Every marriage, contracted between the baptized, mixed or the non-baptized, enjoys stability. It cannot be broken by spouses or any other authority. However, in some cases, keeping in mind the *salus animarum* of the parties, the Church intervenes.[1] By far, the majority of trials in the Church deals with cases regarding the nullity of marriage.[2] The process of declaration of nullity deals with a marriage which is invalid from the time it was contracted. The declaration of nullity does not annul marriage, nor does it dissolve the bond, rather it declares that the said marriage was non-existent in law since the time it had been contracted.[3]

The matrimonial nullity process consists of five distinct phases in the first instance: 1) introductory phase, 2) instructional phase regarding the collection of the evidence, 3) discussional phase geared towards the discussion between parties and defender of the bond, promoter of justice at the direction of the judge, 4) decisional phase, i.e., publishing the sentence or judgement, 5) post-decisional phase which entails the provisions for the appeal and plaint of nullity.[4] For our study, the reflections on the rights of the parties are restricted to the first phase of the process, i.e., introductory/initial phase of the process. This introductory phase, prior to the instruction of the case, is composed of three distinct canonical provisions that the judge must place. Three distinct canonical provisions are: 1) the admission or rejection of *libellus*, 2) the citation of the parties, 3) *litis contestatio* (formulation of doubt or joinder of issues).

The process which begins with the introductory phase of the process has significant consequences and repercussions for an orderly and an efficacious instruction for

* Fr Merlin Rengith Ambrose, BA (Sociology); BTh; MA (Christian Studies); PG Diploma in Canonical Jurisprudence (Rome), Diploma in Canonical Administrative Praxis (Vatican), *Studium* for Postulator for the Causes of Canonization of Saints (Vatican), JCD (Rome) is a Priest of Diocese of Kottar and currently Professor in Centre for Canon Law Studies, St Peter's Pontifical Institute, Bangalore, India.

1 Cf. E. FRANK, The Dissolution of Marriage Bond in the Discipline of the Church and Its Application, Urbaniana University Press, Vatican City 2017, 14.

2 Cf. Z. GROCHOLEWSKI, "Problemi attuali dell'attività giudiziaria della Chiesa nelle cause matrimoniali", in *Apollinaris* 56 (1983), 147-167.

3 Cf. E. FRANK, *The Dissolution of Marriage Bond in the Discipline of the Church and Its Application*, 14.

4 M.R. AMBROSE, *The Right of Defence. An Essential Element in the Marriage Nullity Process*, Thesis ad Doctoratum in Iure Canonico Consequendum, Pontifical Urban University, Vatican City 2019, 102.



discussion and decision arrived at with *certitudo moralis*. The first moment begins with the parties and the judges presenting and framing *status questionis*. When the procedural provisions for the exercise of the rights of the parties at this phase are violated or denied or even when placed incorrectly tend to affect the validity of the sentence. Therefore, we shall examine those procedural provisions in Canon Law which pertain directly and indirectly to the rights of the parties by which they are able to defend themselves in this introductory phase.

## 1. The Right of the Parties vis-à-vis *Libellus*

*Libellus* in Latin means "a little book" or "formal petition."[5] It is commonly referred to as a written petition. To be a valid petition it has to have certain elements.[6] A case is formally introduced to a tribunal by way of a petition without which a judge cannot begin the case *ex officio*. It has to be done as per the law. Can. 1501 (cf. *DC* art. 114) prescribes that a judge cannot investigate any case without a plea, which is drawn up either by a person whose interest is involved or by a promoter of justice. The legislator has set forth in this canon the procedural principle of party's initiative, a long-standing tradition in the canonical procedural law expressed in traditional formula *Nemo iudex sine actore*; *nemo iudex in causa proprio* and *ne procedat iudex ex officio*.[7] According to can. 1620, 4° (cf. *DC* art. 270, 4°), if a trial has to take place without such a judicial plea, the judgement would be irremediably null. The Rotal decision given in 2010 *coram* De Angelis rendered a decision irremediably null, as there was an absence of any petition.[8] Hence, the *libellus* relates the plaintiff to the judge and enables him in the determination of the controversy, the object of proof. One of the fundamental principles of the procedural law is, "the judge in a process can apply law only upon the demand of party."[9] The Rotal judge, Pompedda, in his decision in 1985 emphasized the significance of an introductory *libellus* by saying that it is the beginning and foundation of any judgement.[10] The right to petition for nullity is a procedural right. It does not strictly concern the right of defence. The right of defence concerns the phases, which follow the presentation of the petition in a nullity trial. Hence, the right to

5 Cf. L. CONNERS, *Incidental Causes in Judicial Procedure: A Historical Conspectus and a Commentary*, Catholic University of America, Washington 1971, 120: A *libellus* is a brief written statement, proposing the object of the controversy and seeking the ministry of the judge for the purpose of pursuing the alleged rights.

6 Cf. G. SHEEHY *et alii* (eds), *The Canon Law. Letter and Spirit, A Practical Guide to the Code of Canon Law*, Veritas, Dublin 1995, 862-863: 1) It has to be done by one who has title to such an action; 2) it has to be done against someone who in the law is called the respondent; 3) it has to be done before a judge who has jurisdiction and competence; 4) it should show the determinate object which the judge should deal with; J. KEALY, *The Introductory Libellus in Church Court Procedure*, The Catholic University of America, Washington 1937, 33.

7 "There is no Judge without a plaintiff and he may not proceed *ex officio*".

8 Cf. *Coram* DE ANGELIS, 26 May 2010, in *Studies in Church Law* 7 (2011), 185-190.

9 A. MENDONÇA, "Recent Rotal Jurisprudence from a Sociological Perspective", in *Studia Canonica* 29 (1995), 318.

10 Cf. *Coram* POMPEDDA, 17 June 1985, *RRDec.*, Vol. 77 (1985), 288, n. 7.

petition for nullity of marriage is only the foundation for the protection of the right of defence.

### 1.1 The Right of the Party if the Petition is Rejected

When the *libellus* is accepted by the judge, the decree of the acceptance says that the petition meets the requirements of the law and the trial should begin. Moreover, neither petitioner nor the respondent suffers any harm from not knowing the precise reasons why the judge has accepted the petition. They will have ample opportunity to defend their positions during the pending trial.

On the contrary, "when a petition is rejected, the reasons for rejection must be expressed" in the decree in accord with can. 1617 (cf. *DC* art. 121 §2).[11] Therefore, "the judicial vicar in a case in which he considers impossible to accept the *libellus* must notify the decree of rejection to the petitioner with motivating reasons for his decision."[12] Otherwise, the right of the petitioner would be unreasonably compromised.[13] To honour the right of defence of the petitioner when the petition has been rejected, the reasons for the rejection must be given at least in summary form. Unless the petitioner learns the reasons why the petition is rejected, he/she cannot exercise his/her right to present an amended petition according to can. 1505 §3 (*DC* art. 123), if the petition has been rejected for formal reasons.[14] Nor can the petitioner according to can. 1505 §4 (cf. *DC* art. 124 §1) intelligently exercise his/her right to propose recourse against the decree of rejection of the *libellus* if it was rejected for substantial reasons.[15] In fact, the right of recourse against a decree rejecting the petition is an element of the right of defence in this preliminary phase of the trial. Therefore, the procedural norms requiring the communication of the reasons for the rejection of a petition protect the petitioner's right of defence by allowing him/her to respond to them.

11 Cf. *Coram* FUNGHINI, 22 June 1988, in *Monitor Ecclesiasticus* 114 (1989), 321: "Tunc iudex libellum non admittit, reiectionis datis rationibus"; A. STANKIEWICZ, "De libelli reiectione eiusque impugnatione in causis matrimonialis", in *Quaderni dello Studio Rotale* 2 (1988), 73-89.

12 E. NAPOLITANO, "Le competenze del vicario giudiziale dopo la riforma del processo matrimoniale canonico", in *Studio in onore di Carlo Gullo* (Annales 4), Vol. 3, LEV, Vatican City 2017, 583: "Il vicario giudiziale, nel caso in cui non ritenga possibile ammettere il libello, devo notificare il decreto di rigetto con le motivazioni della sua decisione alla parte cho lo ha sottoscritto (cf. can. 1617; *DC* art. 121)."

13 Cf. O.R. GRAZIOLI, *La querela nullitatis. Origini, attualità e prospettive di comparazione*, Lateran University Press, Vatican City 2016, 69.

14 Can. 1505 §3: "If a petition has been rejected by reason of defects which can be corrected, the plaintiff can draw up a new petition correctly and present it again to the same judge."

15 Can. 1505 §4: "A party is always entitled, within ten canonical days, to have recourse, based upon stated reasons, against the rejection of a petition. This recourse is to be made either to the tribunal of appeal or, if the petition was rejected by the presiding judge, to the collegiate tribunal. A question of rejection is to be determined with maximum expedition."



### 1.2 Before Which Tribunal (Coram Quo)

Establishing a competent forum is very important because a tribunal cannot proceed unless it has the right to hear the case.[16] The purpose is to ensure that the party has a good, reasonable and practical possibility for the right of defending in the trial before the court.[17] However, Pope Francis, in his reform of the marriage nullity process, emphasizes the proximity and accessibility of the judges to the faithful who, owing to various problems in their marital life, doubt the validity of the marriage. He categorically affirms it in order to discover the proper juridical condition of their marriages before the eyes of the Church. The *Ratio Procedendi (RP)*, annexed to the Motu Proprio *Mitis Iudex Dominus Iesus (MIDI)*, explains that the titles of competence in the new can. 1672 are foreseen in order to uphold as much as possible the principle of proximity between the judges and the parties (cf. *RP* art. 7 §1). This new can. 1672, which replaces the abrogated can. 1673, substantially alters the norms governing the title of competence of the forum in marriage nullity cases.

The revised new can. 1672 after *MIDI* prescribes:

> In cases regarding the nullity of marriage not reserved to the Apostolic See, the competencies are:
>
> 1° the tribunal of the place in which the marriage was celebrated;
>
> 2° the tribunal of the place in which either or both parties have a domicile or a quasi-domicile;
>
> 3° the tribunal of the place in which in fact most of the proofs must be collected.[18]

In matrimonial nullity process, the petitioner can submit the petition in the above-mentioned tribunals. Based on the revised *new*[19] can. 1672 after *MIDI*, it can be concluded that the legislator does not consider it useful, for matrimonial cases, to restrict himself only to the principle of *actor sequitur forum rei*.[20] Although they retain

16 Cf. L.G. PRICE – D.A. SMILANIC – V. VONDENBERGER (eds), *The Tribunal Handbook: Procedures for Formal Matrimonial Cases*, CLSA, Washington 2005, 38.

17 Cf. E.J. DILLON, "The Rights of the Respondent in Matrimonial Trials", in *CLSA Proceedings of the Fifty-second Annual Convention*, CLSA, Washington 1991, 84.

18 The new Can. 1672: "In causis de matrimonii nullitate, quae non sint Sedi Apostolicae reservatae, competentia sunt:
1° tribunal loci in quo matrimonium celebratum est;
2° tribunal loci in quo alterutra vel utraque pars domicilium vel quasi-domicilium habet;
3° tribunal loci in quo de facto colligendae sunt pleraeque probationes."

19 The word 'new' refers to those modified canons after the *Mitis Iudex Dominus Iesus* (*MIDI*).

20 Cf. CONGREGATIO DE INSTITUTIONE CATHOLICA, *Istruzione: Gli Studi di Diritto Canonico alla luce della riforma del processo matrimoniale*, LEV, Vatican City 2018, 27: "Nelle cause matrimoniali, a differenza degli altri processi contenziosi, non era considerato titolo di competenza prevalente quello del convenuto, prevedendosi altri tre fori"; M.J. ARROBA CONDE,

unchanged the forum of the place where the marriage has taken place and the forum of the place where respondent has a domicile or quasi-domicile as possible bases for claiming competence in marriage cases, the revised new can. 1672 has brought about liberalization in regard to the competence of the forum of the petitioner and most proofs in contrast to the abrogated can. 1673 of *CIC* before *MIDI*.

The new can. 1672 abrogates the conditions enshrined in the abrogated can. 1673 in order to have access to the forum of the proofs and that of the plaintiff. The abrogated can. 1673 prescribes:

> The following tribunals are competent in cases of the nullity of marriage which are not reserved to the Apostolic See:
>
> 1° the tribunal of the place where the marriage was celebrated;
>
> 2° the tribunal of the place where the respondent has a domicile or quasi-domicile;
>
> 3° the tribunal of the place where the plaintiff has a domicile, provided that both the parties live within the territory of the same Bishops' conference, and that the judicial vicar of the domicile of the respondent, after consultation with the respondent, gives consent;
>
> 4° the tribunal of the place in which in fact most of the proofs are to be collected, provided that consent is given by the judicial vicar of the domicile of the respondent, who must first ask the respondent whether he/she has any objection to raise.[21]

"O motu proprio mitis iudex em relação ao conceito de processo justo", in *Forum Canonicum* 12 (2017), 16: He says that the forum of the plaintiff is also given importance keeping in mind the principle of celerity and proximity; ID., "Il *Mitis iudex Dominus Iesus* in relazione al concetto di 'giusto processo'", in *Quaestiones selectae. De re matrimoniali ac processuali* (Annales 6), LEV, Vatican City 2018, 26: "Già nella disciplina precedente, a differenza di quanto stabilito per le altre cause, il Legislatore non riteneva utile per le cause matrimoniali attenersi al solo principio *actor sequitur forum rei*."

21 Abrogated can. 1673: "In causis de matrimonii nullitate, quae non sint Sedi Apostolicae reservatae, competentia sunt:
1° tribunal loci in quo matrimonium celebratum est;
2° tribunal loci in quo pars conventa domicilium vel quasi-domicilium habet;
3° tribunal loci in quo pars actrix domicilium habet, dummodo utraque pars in territorio eiusdem Episcoporum conferentiae degat et Vicarius iudicialis domicilii partis conventae, ipsa audita, consentiat;
4° tribunal loci in quo de facto colligendae sunt pleraeque probationes, dummodo accedat consensus Vicarii iudicialis domicilii partis conventae, qui prius ipsam interroget, num quid excipiendum habeat."



The revised new can. 1672 abrogates the precautionary constraints[22] or the requirement of consulting the respondent by the judicial vicar of the respondent before giving his consent in order to make the forum of the plaintiff or the forum of the most proofs as competent. The forum of the plaintiff now is extended even to the forum of his/her *quasi-domicilio*.[23] The revised new can. 1672 has given rise to the equivalence of the choice of the forum.[24] The abrogation of the restrictions on the use of the forum of the petitioner as a basis for competence has been welcomed by the North American tribunals.[25] The abrogation of these conditions could be due to the delay and the difficulties which the tribunals have experienced, so as to accelerate the pace of the process.[26] The abrogation of the requirements for the use of this basis for competence does not, however, seem to be without its dangers.[27] There seems to be a disregard for the concerns and the interests of the respondent and consequently for his/her exercise of the right of defence.[28]

22 Cf. M. DEL POZZO, "I titoli di competenza e la 'Concorrenza materiale' alla luce del m.p. *Mitis Iudex Dominus Iesus*", in *Ius Ecclesiae* 28 (2016), 460.

23 Cf. M.J. ARROBA CONDE, "Can. 1672", in A.B. POVEDA (ed.), *Código de Derecho Canónico. Edición bilingüe, fuentes y comentarios de todos los cánones*, Editorial Cultural y Espiritual Popular, Valencia 2016[16], 723.

24 Cf. F.S. REA, *Delibazione di sentenze ecclesiastiche e riforma dei processi canonici di nullità matrimoniale. Dinamiche interne e proiezioni esterne nel 'Mitis Iudex Dominus Iesus' alla luce del 'giusto processo'*, LEV, Vatican City 2018, 59.

25 Cf. J.P. BEAL, "The Ordinary Process According to *Mitis Iudex*: Challenges to Our 'Comfort Zone'", in *The Jurist* 76 (2016), 177: In the North American Context, it enables them to provide a pastoral response to the situation of immigrants whose marriages were celebrated in their countries of origin and whose former spouses reside in places without effectively functioning marriage tribunals.

26 Cf. F. FRANCHETTO, "Il vicario giudiziale e il vicario giudiziale aggiunto", in *I soggetti del nuovo processo matrimoniale canonico* (Annales 5), LEV, Rome 2018, 135.

27 Cf. J. LLOBELL, "Alcune questioni comuni ai tre processi per la dichiarazione di nullità del matrimonio previsti dal m.p. 'Mitis Iudex'", in *Ius Ecclesiae* 28 (2016), 27: "Tuttavia, il MI tiene nella dovuta considerazione il rischio che una procedura semplificata possa affievolire il diritto di difesa del coniuge che non aderisce alla richiesta della nullità del matrimonio, in particolare tenendo conto del nuovo sistema di attribuzione della competenza (cf. can. 1672; RP art. 7 §1)"; ID., "Some Questions Common to the Three Processes for the Declaration of Nullity of Marriage set out in the *Motu Proprio Mitis Iudex*", in P.M. DUGAN – L. NAVARRO – E. CAPARROS (eds), *The Reform Enacted by the m.p. Mitis Iudex. Commentaries and Documentation. Proceedings of a Conference organised by LUMSA Università and the Consociatio Internationalis Studio Iuris Canonici Promovendo Rome, 30 November 2015*, Wilson & Lafleur Limitée, Montréal 2016, 46. M. Del Pozzo is also of the opinion that relaxation of the conditions are considered at the detriment of the protection of the right of defence; M. DEL POZZO, "I titoli di competenza e la 'concorrenza materiale' alla luce del M.P. Mitis Iudex Dominus Iesus", in *Ius Ecclesiae* 28 (2016), 462: "La riforma, conformemente ai suoi intenti dichiarati, ha premiato il criterio della semplicità e immediatezza nell'accesso al giudizio, a scapito magari della maggior protezione del diritto di difesa e della sicurezza dell'accertamento."

28 Cf. M.R. DE OLIVEIRA, "A reforma do processo matrimonial à luz dos princípos gerais do processo canónico", in *Forum Canonicum* 11 (2016), 35-75; G. BONI, "Alcune considerazioni

## 2. The Right to be Cited *(Audiatur et altera pars)*

After having accepted the *libellus*, the judicial vicar, by a decree appended at the bottom of the *libellus* itself, is to order that a copy be communicated to the respondent and summon the respondent to express his/her views within fifteen days (cf. can. 1676 §1). This summons is often referred to as the citation. It is the calling of the other party (*audiatur et altera pars*).[29] This involves the right to be heard which is one of the most significant elements of the right of defence.[30] The respondent is asked to give his/her opinion within fifteen days. Arroba Conde observes that the citation has its ultimate scope as the guarantee of the right of defence.[31] A trial begins with the citation (cf. can. 1517), without which there is the denial of the right of defence of the respondent.[32] N. Picardi observes that the nucleus of the procedural rights is the right of the respondent to defend him/herself.[33] A citation is a legitimate act whereby a respondent is called to a trial and it is necessarily required not only by the positive law but also by the natural law because it pertains to natural defence. The Supreme Tribunal of the Apostolic Signatura considers this citation as one of the most significant rights of the parties.[34] The responsibility of the tribunal to provide the respondent with the opportunity to exercise his/her rights is primarily carried out by this summons. This summons informs the respondent of the plaintiff's plea and affords him/her an opportunity for the exercise of the right of defence.[35] If the summons is not lawfully communicated to the respondent, the procedural acts are null (cf. can. 1511; *DC* art. 128) and the judgement

sulle possibili difficoltà insorgenti nell'*Exequatur* in Italia delle sentenze canoniche di nullità matrimoniale dopo il *Mitis Iudex*", in *Studio in onore di Carlo Gullo* (Annales 4), Vol. 1, LEV, Vatican City 2017, 189.

29 Cf. A.R. Remo, "The Right of Defence and the Defence of Rights", in *Philippine Canonical Forum* 2 (2000), 195.

30 Cf. V.G. Maria Sebastian, *I graviora delicta riservati alla congregazione per la dottrina della fede*, Theses ad doctoratum in iure canonico assequendum, Pontificia Universitas Lateranensis, Romae 2011, 358.

31 Cf. M.J. Arroba Conde, *Diritto processuale canonico*, Institutum Iuridicum Claretianum, Rome 2001[4], 234.

32 For an analysis of the hypothesis which says that absence of the citation leads to the denial of the right of defence: cf. G. Erlebach, *La nullità della sentenza giudiziale 'ob ius defensionis denegatum' nella giurisprudenza Rotale*, (Studi Giuridici 25), LEV, Vatican City 1991, 240-214; Stankiewicz, "De citationis necessitate et impugnatione", in *Monitor Ecclesiasticus* 114 (1989), 373-396.

33 Cf. N. Picardi, "Audiatur et Altera Pars – le matrici storico-culturali del contraddittorio", in *Rivista trimestrale di diritto e procedura civile* 55 (2003), 10.

34 Cf. STAS, "Letter *circolare su talune questioni riguardanti la tutela del diritto di difesa nel processo di nullita del matrimonio* Prot. N. 33840/02 V.T. (14 November 2002)", 870; W.L. Daniel (ed.), *Ministerium iustitiae. Jurisprudence of the Supreme Tribunal of Apostolic Signatura. Official Latin with English Translation*, Gratianus Series, Wilson & Lafleur Limitée, Montreal 2011, 749-754.

35 Cf. J. McAreavey, *The Canon Law of Marriage and the Family*, Four Courts Press, Dublin 1997, 183.



of the tribunal is irremediably null due to the denial of the right of defence.[36] Failure to communicate the summons is an example of denial of this right of defence (cf. can. 1620, 7°; *DC* art. 270, 7°), since the respondent has the right to be heard when a tribunal is investigating the marriage and that right should be restricted only to the gravest and the most exceptional reasons.[37] Nonetheless, if the party, who is necessarily to be summoned, in fact, appears in the court, he/she is considered to be summoned though no document of summons has been issued (cf. can. 1507 §3; *DC* art. 126 §3).

In a judicial process, natural justice demands that the respondent should be summoned as nobody is to be judged unheard. As V.M. Goertz observes:

> An absent person should not be punished nor condemned; for the condemnation of anyone without having heard his case causes equity to suffer. To condemn someone who has not been peremptorily cited or to condemn him when the citation served, did not reach him, is to act invalidly.[38]

Grocholewski is of the opinion that establishing these procedural relations of the petitioner and of the respondent with the tribunal is an essential condition for guaranteeing the natural right of defence.[39] If the respondent lacks the use of reason or is of impaired mind and, therefore, has no standing in court, the summons should be sent to the curator (cf. can. 1508 §3; *DC* art. 131 §1). Moreover, the law safeguards the administration of justice by prescribing that a respondent who refuses to accept the document of the summons, or who circumvents the delivery of the summons is to be considered as lawfully summoned (cf. can. 1050; *DC* art. 133).

### 2.1 The *Libellus* Attached to the Summon

According to can. 1508 §2 and can. 1676 §1, the *libellus* is attached to the summons. Can. 1676, §1 states:

> After receiving the *libellus*, the judicial vicar, if he considers that it has some basis, admits it and, by a decree appended to the bottom of the *libellus*, is to order that a copy be communicated to the defender of the bond and, unless the *libellus* was signed by both parties, to the respondent, giving them a period of fifteen days to express their views on the petition.

36 Cf. M.J. Arroba Conde, *Diritto processuale canonico*, Institutum Iuridicum Claretianum, Rome 2012[6], 357; D.S. Fernandes, "Procedures to be Followed in Marriage Nullity Cases", in *Canonical Studies* 25 (2011), 93-121.

37 Cf. L.G. Wrenn, "The Rights of a Respondent to be Cited if Potentially Violent", in W.A. Schumacher *et alii* (eds), *Roman Replies and CLSA Advisory Opinions 1987*, CLSA, Washington 1987, 140.

38 Cf. V.M. Goertz, *The Judicial Summons: A Historical Synopsis and a Commentary*, The Catholic University of America Press, Washington 1957, 2.

39 Cf. Z. Grocholewski, *Štúdie z procesného kanonického práva*, transl. by J. Duda, Kňažský seminár biskupa Jána Vojtaššáka, Spišské Podhradie 1995, 157.

Thus, the respondent has the opportunity to set in motion the options for defence. Hence, when a respondent knows what he/she is being accused of, he/she can exercise his/her right of defence. A person is evidently deprived of his/her right of defence if he/she has no proper knowledge of what the other party alleges and what the other party adduces by way of proof.[40] The respondent cannot defend himself/herself without having access to the entire *libellus* at the time of citation in order to know the content of the allegations.[41] Therefore, the respondent's right to be informed of the petitioner's claim is parallel to the right of the petitioner to introduce the petition in order to defend his/her rights. Rotal jurisprudence is also of the opinion that the notification of the petition is an important condition for the respondent's exercise of the right of defence.[42]

### 2.2 The Withholding of the *Libellus* at the Time of Citation

The right of the respondent to see a copy of the petition at this introductory phase is not absolute[43] as mentioned in can. 1508 §2[44] (cf. *DC* art. 127 §3). Can. 1508, §2 states:

> The petition introducing the suit is to be attached to the summons, unless for grave reasons the judge considers that the petition is not to be communicated to the other party before he or she gives evidence.

For serious reasons, the judge may decide not to reveal the formal petition to the respondent before the respondent gives evidence. The serious reasons for this exception are elaborated in the 1976 *schema*.[45] The 1976 *Schema* of "*De processibus*" permitted the judge for grave cause to withhold the petition until the respondent gave evidence

40 Cf. R. BROWN, *Marriage Annulment in the Catholic Church*, Suffolk, Kevin Mayhew Limited, 1990[3], 138.

41 Cf. *Coram* FAGIOLO, 30 October 1968, *RRDec.*, Vol. 60 (1968), 713: "Citationis ratio igitur nititur naturali iure quod postulat ne quis damnetur nisi prius auditus fuerit seseque defendere potuerit."

42 Cf. *Coram* GIANNECCHINI, 23 May 1989, *RRDecr.*, Vol. 7 (1989), 95, n. 2: "Substantialiter defensio habetur quando, cognita petitione alterius partis, utriusque Patronis facultas facta est: probationes omnes alterius partis cognoscendi, [...]."

43 Cf. G. SHEEHY *et alii* (eds), *The Canon Law. Letter and Spirit, A Practical Guide to the Code of Canon Law*, 866.

44 Cf. can. 1508 §2: "Citationi libellus litis introductorius adiungatur, nisi iudex propter graves causas censeat libellum significandum non esse parti, antequam haec deposuerit in iudicio."

45 Cf. PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Relatio Complectens synthesim animadversonum ab Em.mis atque Exc.mis patribus commissionis ad Novissimum schema codicis iuris canonici exhibitarum, cum responsionibus a secretaria et consultaribus datis*, Typis Polyglottis Vaticanis, Vatican City 1981, 317-318; *Communicationes* 16 (1984), 62: "In nationibus ubi viget systema iuridicum 'common law', ut vocant, hoc fieri non potest sine periculo quaerelae apud tribunal civile, quae vero gravia consectaria pro administratione iustitiae in Ecclesia secumfert"; K. LÜDICKE – R.E. JENKINS, *Dignitas Connubii: Norms and Commentary*, CLSA, Alexandria 2006, 131. The petition might elicit a strong animosity from the respondent against the plaintiff, thus destroying the chances of the respondent participating in the search for the truth. Statements made in the petition might annoy relatives of the respondent and thereby refusing to function as witnesses.



(cf. can. 144 of the 1976 *Schema*). The 1980 *Schema* removed this provision and did not give the judge the discretionary power. This matter was taken up at the October 1981 meeting of the Code Commission. Some members of the Commission asked that provision be made for those countries under a Common law system. It was felt that if the petition was sent with the summons, there was always possibility of an action before the secular courts and a serious restriction on the administration of justice within the Church. Therefore, the revised *CIC* 1983 gave the discretionary power to the judge.

A decision of the Supreme Tribunal of the Apostolic Signatura in 1971 observed, "the respondent does not have the right to know the petition of the petitioner either while being cited or at the time of the joinder of issues."[46]

As stated above, the formal petition contains the proof by which the plaintiff will demonstrate the case. Hence, the grave reasons for withholding the petition would be the legitimate fear that the respondent may initiate a civil action of defamation against the plaintiff or the Church.[47] Hence, to decide what really constitutes a grave reason belongs to the judge[48] who may exercise discretion in this regard (cf. can. 1508 §2). This option of not attaching the petition to the summons must be considered only as an exception, because it interferes with the right of defence.[49] Nevertheless, S. Villeggiante says that the judge does not have unlimited discretion in this regard, since it is only for serious reasons that he may decide that the petition is not to be communicated to the respondent until he/she makes a deposition.[50]

### 2.3 The Innovation of *Dignitas Connubii* on Citation

More clarity has been offered by *DC* in this regard. Can. 1508 §2 (cf. *DC* art. 127 §3) decrees that the petition introducing the suit is to be attached to the decree of citation which is communicated to the respondent. It is further stated that, for grave reasons, the judge may decide not to reveal the formal petition to the respondent before he/she gives evidence. But *DC* art. 127 §3 goes a step further decreeing in the same article, "[...] in this case, however, it is required that the respondent party be notified of the

46 STAS, Decision *in Congressu* (6 April 1971), in X. OCHOA (ed.), *Leges Ecclesiae*, Vol. 4, Ediurcla, Romae 1987, col. 5989: "Pars conventa non habet ius cognoscendi libellus partis actricis nec quando accipit citationem, nec in ipsa sede litis contestationibus"; cf. L. SABBARESE, *Il matrimonio canonico nell'ordine della natura e della grazia*, Urbaniana University Press, Vatican City 2019[5], 448.

47 Cf. M.S. FOSTER, *Annulment: The Wedding That Was*, Paulist Press, New York 1999, 137.

48 Cf. *Communicationes* 16 (1984), 62-63.

49 Cf. S.P. ORALLO, "The Ordinary Contentious Trial", in Á. MARZOA *et alii* (eds), *Exegetical Commentary on the Code of Canon Law*, Vol. 4/2, Wilson & Lafleur Limitée, Montréal 2004, 1140.

50 Cf. S. VILLEGGIANTE, "Il principio del contradditorio nella fase di costituzione del processo ordinario per la nullità del matrimonio", in Z. GROCHOLEWSKI – V.C. ORTÌ (ed.), *Dilexit Iustitiam: Studia in Honorem Aurelii Card. Sabattani*, LEV, Vatican City 1984, 360.

object of the case and the ground(s) proposed by the plaintiff."[51] In order to safeguard the right of defence of the respondent, it is advisable that he/she should also be informed of the ground(s) the plaintiff has advanced and the reasons for the same.[52] Without this minimal information the respondent would not be in a position to express his/her opinion regarding the formulation of doubt.[53] This makes provision for the exercise of the right of defence stronger and more conducive to the respondent who, based on the knowledge given to him/her through citation, can defend him/herself. This provision, newly added by *DC* in its art. 127 §3, foresees the possibility of providing the chances for the respondent to exercise the right of defence even at an earlier phase of the trial. If the petition is withheld, the respondent's right of defence is not lost, because the summons will contain the reasons behind the plaintiff's plea.[54] According to Hilbert, it is sufficient that the respondent knows the request and its motives.[55] In addition, the respondent will be given access to the formal petition later on in the process during the publication of the acts.[56] In this way, the right to see the petition is not denied; rather, it is only delayed.[57]

## 2.4 The Rights Pertaining to the Citation of the Party in Different Circumstances

Having analyzed the significance of citation and its close link with the right of defence, it is also important to make a study on the various circumstances and the conditions of the respondent and how he/she could be cited in order to guarantee provision for the right of defence.

### 2.4.1 The Incarcerated Respondent

The respondent who is incarcerated has also the right to be cited. This party also has the right of defending him/herself and should be given an opportunity to exercise this right. Therefore, the fact of being incarcerated does not deprive the party of the right of defence in the nullity cases. It is true that the respondent in such a situation may not be in a position to present him/herself in person in the tribunal. However, he/she must

51 *DC* art. 127 §3: "[…] Hoc tamen in casu requiritur ut parti conventae notificentur obiectum causae et ratio petendi ab actore adducta."

52 Cf. M.J. Arroba Conde – C. Izzi, *Pastorale giudiziaria e prassi processuale nelle cause di nullità del matrimonio. Dopo la riforma operata con il Motu proprio Mitis Iudex Dominus Iesus*, San Paulo, Milan 2017, 96-97: "Tuttavia in tal caso, per salvaguardare il diritto di difesa della parte citanda, occorre giustificare tramite decreto motivato l'omessa allegazione e notificare alla parte convenuta l'oggetto della causa e la ragione della domanda attorea."

53 Cf. K. Lüdicke – R.E. Jenkins, *Dignitas Connubii: Norms and Commentary*, 228.

54 Cf. M.S. Foster, *Annulment: The Wedding That Was*, 139.

55 Cf. M. Hilbert, "Citazione e intimazione degli atti giudiziari (cc. 1507-1512)", in *Forum* 3 (1992), 46.

56 Cf. Z. Grocholewski, "De period initiali seu introductoria processus in causis nullitatis matrimonii", in *Periodica* 85 (1996), 83-116.

57 Cf. R.M. McGuckin, "The Respondent's Rights in a Marriage Nullity Case", in H.F. Doogan (ed.), *Catholic Tribunals: Marriage Annulment and Dissolution*, Southwood Press, Australia 1990, 139.



be given the opportunity to defend him/herself by responding in writing, by a telephone interview or by appointing an auditor to go to the prison in order to interview the respondent.[58] The diocesan bishop could also appoint a procurator for the incarcerated respondent. These measures could be viewed as the means to protect the incarcerated person's right of defending in the nullity process.

### 2.4.2 The Respondent Whose Whereabouts is Unknown

When the whereabouts of the respondent is unknown, adequate efforts should be made to discover his/her location. In *CIC* 1917, a "summons by edict" was allowed (cf. can. 1720), when the diligent efforts made to locate the whereabouts of the respondent failed. Can. 1509 §1 of *CIC* 1983 envisages due regard to the norms laid down by particular law on the manner of summons. *CIC* 1983 is silent on summons by edict and the reason for not including edict as one of the means had been discussed in the *schema*.[59] It is clear that the legislator envisages more effective methods depending on the local circumstances for the citation of the respondent who is unable to be traced. They could consider appropriate measures such as a notice in a newspaper or Diocesan News Letter.[60] However, *DC* art. 132 §1 prescribes:

> Whenever, after a diligent investigation has been made, it is still unknown where a party lives, who is to be cited or to whom some act is to be communicated, the judge can proceed further, but there must be proof in the acts of the diligent investigation that was made.[61]

*DC* art. 132 §2 also envisages categorically the need for summons by edict if the particular law establishes, whenever, after a diligent investigation, the whereabouts of the party still remains unknown. Hence, *mens legis* is to ascertain that the tribunal makes all possible efforts, so that the respondent can exercise his/her right of defence.[62]

58 Cf. P.O. Akpoghiran, *Mitis Iudex: Text and Commentary*, Transfiguration Press, New Orleans, Louisiana 2017, 183.

59 Cf. Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Relatio Complectens synthesim animadversonum ab Em.mis atque Exc.mis patribus commissionis ad Novissimum schema codicis iuris canonici exhibitarum, cum responsionibus a secretaria et consultaribus datis*, 318. The 1976 *Schema* of "De processibus" allowed summons by edict (cf. can. 150). The *coetus*, which met in 1978, set out precisely to reduce and simplify it. Hence, in the meeting held in October, 1978, can. 150 was suppressed. The Code Commission which met in October, 1981 discussed the question of the summons by edict. Some members requested the re-admission of the canon. It was, however, decided that this was not necessary since the canon on the summons had due regard to norms laid down by particular law.

60 Cf. R.M. McGuckin, "The Respondent's Rights in Matrimonial Nullity Case", 457-481.

61 *DC* art. 132 §1: "Quoties, diligenti inquisitione peracta, adhuc ignoretur ubi degat pars citanda vel pars cui aliquod actum notificandum est, iudex ad ulteriora procedere potest, sed de sedula inquisitione peracta constare debet in actis."

62 Cf. J. Llobell, *I processi matrimoniali nella chiesa*, EDUSC, Rome 2015, 182; F. Daneels, "Observations on the Process for the Declaration of Nullity of Marriage", in *Forum* 11 (2000), 472.

Wrenn opines that in such a situation in order to protect the right of defence, the judge can appoint a guardian.[63]

### 2.4.3 The Respondent Refusing the Summons

Experience shows that the respondent often refuses to receive the summons for various reasons: 1) due to aversion to the plaintiff; 2) to impede the declaration of nullity; 3) to obtain money for the collaboration in the process; and 4) because of disrespect for the ecclesial authority, etc. While the judge has an obligation to send summons, the respondent has no obligation to accept it as he/she is not obliged to exercise the right of defence against the plaintiff.[64] The non-cooperation of the party to receive the summons and to appear before the tribunal would necessitate the judge to declare the respondent absent with due regard for cann. 1592-1595. Can. 1592 §2 stipulates that before declaring the respondent absent and decreeing that the case is to proceed to the definitive judgement, the judge should ensure, if need be, by issuing another summons so that a lawful summons did reach the respondent. *DC* art. 134 §3 states, "to a party who has been declared absent from the trial, there shall be communicated the formulation of the doubt and the definitive sentence, without prejudice to art. 258 §3"[65] which prescribes that the dispositive part of the sentence should be notified to the one who has renounced his/her right.[66] This provision is also enshrined in *RP* art. 13.[67]

### 2.4.4 The Party Entrusting Oneself to the Justice of the Court

When a respondent is cited, he/she must respond to the judge. But at times the cited party entrusts him/herself to the justice of the court. A respondent who has entrusted him/herself to the justice of the tribunal is the one who, when cited, responds and makes a declaration that he/she does not wish to participate in the trial and according to *RP* art. 11 §2 he/she is deemed not to object to the petition. Therefore, he/she entrusts the just resolution of the case in the hands of the judge. However, *DC* art. 134 §2 states:

> To those parties who entrust themselves to the justice of the court after the citation, must be communicated the decree by which the formulation of the doubt is determined, any new petition which might have been made, the decree of the publication of the acts, and all decision of the college.[68]

Thus, *DC* makes provision for the parties for the possibility of exercising the right of defence in the real sense, even after entrusting themselves to the justice of the court.[69]

### 2.4.5 The Violent Respondent

It is obvious that the judge must spare no effort to safeguard the natural right of the respondent for defence by way of citation. Some petitioners, owing to their violent and aggressive experiences with the respondent in the past, can genuinely fear the violent and dangerous reactions of the respondent, if the judge summons the party. In circumstances like these, therefore, the plaintiff and the advocate could make a request that the tribunal does not summon the respondent. Nevertheless, the Supreme Tribunal of the Apostolic Signatura is unwilling to dispense with the canonical obligation of summoning the respondent.[70] Hence, obviously the right of the respondent plays a vital role as it concerns the right of defence, even though certain risks and dangers can emerge. If the judge truly finds the respondent violent, he may appoint a curator. Wrenn opines that the appointment of a guardian could be a solution in the case of a violent or untraced respondent.[71]

## 3. The Various Rights of the Parties

Parties enjoy many rights, which enable their exercise of the right of defence.[72] One such right is their right to various pieces of information. The right of defence implies knowledge of the issues and matters to be defended. The respondent in a suit can exercise the right of defence lawfully when he/she is aware of the issues contested and the means of the trial. Therefore, the respondent has the right to a variety of information before the instruction of the case begins, so he/she can exercise his/her rights effectively in a process. Further, the respondent needs to be provided with all the necessary information in the course of the process. The right to information[73] (*ius ad informationem*), which we discuss below, concerns the right of defence of the parties.

63 Cf. L.G. WRENN, *Procedures*, CLSA, Washington 1987, 39.

64 Cf. V.G. D'SOUZA, "The Introductory Phase in Matrimonial Nullity Process", in *Canonical Studies* 15 (2001), 101.

65 *DC* art. 134 §3: "Parti, cuius absentia a iudicio declarata fuerit, notificabuntur formula dubii et sententia definitiva, salvo art. 258 §3."

66 Cf. *DC* art. 258 §3: "But if a party has declared that he does not want any notice at all about the cause, he is considered to have renounced his right to obtain a copy of the sentence. In such case, with due observance of particular law, the dispositive part of the sentence may be communicated to the same party."

67 Cf. *RP* art. 13: "If a party expressly declares that he or she objects to receiving any notices about the case, that party is held to have renounced the faculty of receiving a copy of the sentence. In this case, that party may be notified of the dispositive part of the sentence."

68 *DC* art. 134 §2: "Partibus, quae sese remittunt iustitiae tribunalis, notificari debent decretum quo formula dubii statuta est, nova forte facta petitio, decretum publicationis actorum et omnes collegii pronuntiationes."

69 Cf. J.I. ARRIETA (ed.), *L'istruzione Dignitas Connubii nella dinamica delle cause matrimoniali*, Marcianum Press, Venezia 2006, 55.

70 Cf. STAS, Reply, 14 June 1989, in W.A. SCHUMACHER *et alii* (eds), *Roman Replies and CLSA Advisory Opinions 1989*, 27-29: Apostolic Signatura, in its reply to the judicial vicar of Perge in 1989 who petitioned for the dispensation of summons, negated the omission of the summon to the violent respondent.

71 Cf. L.G. WRENN, *Procedures*, 39.

72 Cf. W.L. DANIEL, "Nullity of the Definitive Sentence due to the Violation of the Right of Defence: A Case Study", in *The Jurist* 71 (2011), 164.

73 Cf. C. PAPALE, *I processi. Commento ai canoni 1400-1670 del Codice di Diritto Canonico*, Urbaniana University Press, Vatican City 2017, 371.

### 3.1 The Right to Knowledge of the Constitution of the Tribunal

According to the new can. 1676 §3, the judicial vicar, when communicating the formula of doubt to the parties by a decree, should also arrange the constitution of the tribunal with the judge/judges and other tribunal personnel by the same decree. Therefore, the decree of formula of doubt, which is communicated to the parties, will also contain the details of the constitution of the tribunal. Since the current legislation insists that the process is to be objective[74] the relationship between the parties and the personnel of the tribunal has to be built upon trust, objectivity and confidence. Moreover, "the judge is a public person invested with the function of judging in a trial actualizing in the concrete case the general norms of law."[75] Thus, the elements of neutrality and impartiality of the judge are fundamental to a just and impartial proceeding of the case. Can. 1448 (cf. *DC* art. 67) enumerates:

> That the judge is not to undertake the hearing of a case in which any personal interest may be involved by reason of consanguinity or affinity in any degree of the direct line and up to the fourth degree of the collateral line, or by reason of guardianship or tutelage, or of close relationship or marked hostility or possible financial profit or loss.[76]

Can. 1449 §1 (cf. *DC* art. 67 §2) presumes the voluntary withdrawal from a case by a judge when he has a personal interest in the case. The following three cann. 1449-1451 (cf. *DC* artt. 68 §1, 69 §1 and 70 §1) treat the case in which a party lodges an objection of suspicion against an official of the court, when the official, despite a personal interest in the case declines to withdraw voluntarily.[77] The question of the right of defence does arise, though, when the objection proposed is never resolved.[78]

Though can. 1448 (cf. *DC* art. 67) does not enumerate the respondent's right to this knowledge directly, it permits the parties to lodge objections against the officials of the

74 Cf. M. NOBEL, "The Validity of the Acts of a Suspect Judge", in *Studia Canonica* 44 (2010), 5-30.

75 L. SABBARESE, *Il matrimonio canonico nell'ordine della natura e della grazia*, 428; cf. F.M. CAPPELLO, *Summa Iuris Canonici*, Vol. 3, Apud aedes Universitatis Gregoriane, Romae 1955[4], n. 71.

76 Can. 1448 §1 of *CIC* 1983: "Iudex cognoscendam ne suscipiat causam, in qua ratione consanguinitatis vel affinitatis in quolibet gradu lineae rectae et usque ad quartum gradum lineae collateralis, vel ratione tutelae et curatelae, intimae vitae consuetudinis, magnae simultatis, vel lucri faciendi aut damni vitandi, aliquid ipsius intersit."

77 Cf. L.G. WRENN, "Commentary on can. 1449", in J.P. BEAL – J.A. CORIDEN – T.J. GREEN (eds), *New Commentary on the Code of Canon Law*, 1636.

78 Since the procedural relationship of the judge and the parties is seriously tainted when one of the judges lacks the impartiality that is essential for judicial independence, when a legitimately posed objection of suspicion is overtly ignored, it can result in the irremediable nullity of the sentence due to the denial of the right of defence: cf. *Coram* BOCCAFOLA, 13 February 1988, *RRDecr.*, Vol. 6 (1988), 37-38, n. 12. In this case objection was against two of the judges, a majority of the college.



tribunal for the above-mentioned reasons. In this regard, the respondent indirectly exercises the right of defence. Hence, he/she prevents him/herself from being given a biased or one-sided judgement due to the personal interests of the personnel of the tribunal with the plaintiff and wards off the risk of any position of interest.[79]

### 3.2 Rights during the Fixing of the Formula of Doubt

As it was discussed earlier, the acceptance of the petition is followed by the communication of the decree appended at the bottom of the *libellus* itself to the respondent, giving them a period of fifteen days to express their views on the petition (cf. can. 1676 §1). The respondent is admonished and given fifteen days to express his/her views on the petition. At the expiry of fifteen days from the notification of the summons, the judicial vicar can determine by his decree the terms of controversy after having correctly interpreted the pleas and the views of the parties or even the silence of the respondent. Therefore, the right for the respondent to respond to the citation of the judge protects his/her right of defence as he/she is able to defend his/her views by expressing them to the judicial vicar at the very early phase of the fixing of terms of controversy. The judicial vicar cannot form the terms of controversy in a generic form. The formulation of doubt must determine on what ground(s) the validity of the marriage is challenged.[80] The indispensable need of the formula of doubt in a contentious trial is stated by Rotal decisions given by Parisella[81] and Pompeda.[82]

There is a significant change in determining the formula of doubt in the new can. 1676 after *MIDI*. The change is seen in the new can. 1676 §2 as opposed to the abrogated can. 1677 §4. L. Sabbarese argues that this change affects the exercise of the right of the parties to make recourse to the same judge or to request the decree be altered.[83]

### 3.3 The Right to Recourse against the Decree of Joinder of Issue

According to the abrogated can. 1677 §4, the party, after being notified of the decree of formula of doubt, can make objection within ten days, if they feel that there is some injustice in the fixing up of the formulation of the doubt. Thus, according to the abrogated can. 1677 §4, the parties, when they feel that the formula of doubt has been unjustly or improperly fixed, or that the views they have expressed to the judge after the citation are not respected or taken into account, could make an objection and defend their right to justice, asking for the change of the formula of doubt. But this provision is not found in the new can. 1676 after *MIDI*. According to the new canon, the party is

79 Cf. M. NOBEL, "The Validity of the Acts of a Suspect Judge", 5-30.

80 For more clarification: cf. M.J. ARROBA CONDE – C. IZZI, *Pastorale giudiziaria e prassi processuale nelle cause di nullità del matrimonio. Dopo la riforma operata con il Motu proprio Mitis Iudex Dominus Iesus*, 99; P.O. AKPOGHIRAN, *Mitis Iudex: Text and Commentary*, 209.

81 Cf. *Coram* PARISELLA, 24 March 1983, *RRDec.*, Vol. 75 (1983), 146-153.

82 Cf. *Coram* POMPEDDA, 17 June 1985, 288-294.

83 Cf. L. SABBARESE, *Canon Law. An Overview*, Urbaniana University Press, Vatican City 2017, 268.

deprived of the ten-day period and the opportunity to lodge any objection against the formula of doubt which was notified to them by the decree (cf. new can. 1676 §2). Therefore, there is no need for the judicial vicar to wait for ten days after communicating the decree of formulation of doubt before he issues the decree of the instruction of the case. This elimination of the time period tends to harm the exercise of the right of defence.[84] Therefore, in its effort to speed up the trial, the new can. 1676 seems to have jeopardized the actual exercise of the right of defence.[85]

However, as long as the judge takes the views of the respondent into serious account and fixes the formula of doubt very meticulously, he can always avoid any unnecessary disrespect towards the parties and their views and therefore the parties will have no need to lodge an objection. This entails the proper and due diligence of the judge in fixing up the formula of doubt in the trial at this phase. If tribunals are proceeding in a responsible fashion, there is no more risk to denying the right of defence.[86]

However, L. Sabbarese claims that in such situations where the parties feel that they have something to say against the formula of the doubt and defend such a right, the provision of can. 1513 §3 can be applied in order to protect the right of defence.[87] Can. 1513 §3 prescribes:

> The decree of the judge is to be notified to the parties; unless they have already agreed on the terms, they may within ten days have recourse to the same judge to request that the decree be altered. This question, however, is to be decided with maximum expedition by a decree of the judge.[88]

By virtue of the general norm can. 1691 §3 and *RP* art. 6, "canons on trials in general and on the ordinary contentious trial must be applied unless the nature of the matter precludes it." Therefore, can. 1513 §3 could be applied when the parties seriously insist that their views are not being considered properly by the judicial vicar in fixing up the formula of doubt and consequently there is injustice meted out to them. Thus, it could be still claimed that the right to make recourse against the decree of the joinder of issue or to request the decree be altered is not diminished due to the changes effected by *MIDI* in this regard.

84 B.N. EJEH, "'Mitis Iudex Dominus Iesus': obbiettivi, novità e alcune questioni", in *Ephemerides Iuris Canonici* 56 (2016), 390: "Uno degli aspetti più delicati della riforma del processo canonico riguarda come ridurre i termini dilatori del sistema giudiziale senza intaccare il giusto procedimento necessario al fine di tutelare adeguatamente il diritto di difesa delle parti in causa."

85 Cf. L. SABBARESE, *Canon Law. An Overview*, 268.

86 Cf. A.M. LASCHUK, "Mitis Iudex and the Conversion of Ecclesiastical Structures", in *Studia Canonica* 51 (2017), 537.

87 Cf. L. SABBARESE, *Canon Law. An Overview*, 268.

88 Can. 1513 §3: "Decretum iudicis partibus notificandum est; quae nisi iam consenserint, possunt intra decem dies ad ipsum iudicem recurrere, ut mutetur; uaestio autem expeditissime ipsius iudicis decreto dirimenda est."



### 3.4 The Notification of the Terms of Controversy

The determination of doubt and the notification of the terms of controversy (*Litis contestatio*) are strictly judicial concepts and are associated with the right of defence.[89] Without determination of the matter there cannot be judgement. Besides, the parties cannot defend themselves if they do not know what the term of controversy is and what they are going to decide. Therefore, the knowledge of the exact issues to be resolved by the trial is fundamental to the parties' informed partici pation in the process. J.G. Johnson wonders how the respondent can defend him/herself if he/she does not know the ground(s), i.e., for what reason the marriage is being accused of nullity.[90] Failure on the part of the tribunal to notify the ground of nullity to the parties, therefore, amounts to denial of the right of defence and consequently the irremediable nullity of the sentence as per can. 1620, 7° (cf. *DC* art. 270, 7°).[91] The communication of this decree of the joinder of issue to the parties bears on the right of defence.

During the revision of the Code, some consulters were of the opinion that the notification of the decree of the terms of controversy is superfluous because rarely is the controversy defined different from the ground(s) stated in the petition and in the summons. Therefore, they suggested that the decree should be communicated to the parties only when the terms of controversy is different from the one stated in the petition and the summons. To this, the Code commission responded that since the *libellus* might be unclear or might lack the exact words and juridic terms, the notification of the decree is compulsory.[92] Hence, the decree of the judge which defines the term of controversy or the formula of doubt must be sent to the parties and the defender of the bond (cf. can. 1513 §3, 1676 §2).[93]

John Paul II considered this right so important that he observed that even the party who has renounced the exercise of the right of defence should be notified of the terms of the controversy. He states:

89 Cf. A. ASSELIN, "L'interrogation des parties et des témons dans la cause en nullité de marriage selon la formulation du route", in *Studia Canonica* 41 (2007), 237-277.

90 Cf. J.G. JOHNSON, "Publish and Be Damned: The Dilemma of Implementing the Canons on Publishing the Acts and the Sentence", in *The Jurist* 49 (1989), 211.

91 Cf. Z. GROCHOLEWSKI, "Current Questions Concerning the State and Activity of Tribunals with Particular References to the United States of America", in R.M. SABLE (ed.), *Incapacity for Marriage. Jurisprudence and Interpretation*, Pontificia Universitas Gregoriana, Rome 1987, 246.

92 Cf. *Communicationes* 16 (1984), 64: "Notificatio contestationis litis per iudicis decretum superflua est cum fere semper non differat a libello et a citatione. Proponitur sequens textus: [...] si dubium concordandum a dubio in citatione notificato reapse differt, decretum iudicis de litis contestatione partibus notificandum est; quae [...] Notificatio decreti necessaria est ut partibus iuridice constet de obiecto iudicii, quod in libello non semper clare et exactis verbis et terminis iuridicis praesentatur."

93 Cf. *Ibid.*

I deem it opportune to remind all engaged in the administration of justice that, according to the sound jurisprudence of the Roman Rota, in cases of matrimonial nullity the party who may have renounced the exercise of right of defence should be notified of the formula of the *dubium*, of every possible new demand of the opposing party, as well as of the definitive sentence.[94]

### 3.5 The Change in Terms of Controversy

According to the new can. 1676 §1 after *MIDI*, the judicial vicar is responsible for joining the issue and fixing the ground by which the validity of the marriage is challenged and decided. According to can. 1514 (cf. *DC* art. 136), it prohibits a judge from changing the terms of controversy *ex officio* once it is fixed and notified. They can only be validly altered if the following conditions are met: 1) the presence of a grave reason; 2) the request for change on the part of one of the parties, i.e., the plaintiff, the respondent, the defender of the bond and the promoter of justice; and 3) the hearing of the other party on the part of the judge (cf. can. 1514; *DC* art. 136). The judge must give consideration to the other party's reasons but is not bound to seek the latter's consent.[95] Hence, the provision for consulting the other party implies an opportunity for the party to defend his/her opinion and place his/her view regarding the change, which is sought. This provision also affords the party an opportunity for his/her exercise of the right of defence because the parties are offered the opportunity of placing exceptions to the proposed new ground, if there are any, within a given time-limit.[96] The consent of this party is not required for the grounds to be changed, but only that this party must be heard; and 4) a new formal decree must be issued by the judge who should carefully weigh the motives adduced by the party requesting the change. In the absence of any of these conditions, a decree by which the ground(s) of nullity are changed would be null for violating the norm of can. 1514 (cf. *DC* art. 136) and consequently, the sentence itself would risk remediable nullity because it would be based on a null act (cf. can. 1622, 5°).[97] In accord with the norm of can. 1620, 4° (cf. *DC* art. 270, 4°),[98] the sentence would also be irremediably null because of a pronouncement *extra vel ultra petita* and there is a violation of the principle of

94 JOHN PAUL II, Allocution to the Roman Rota (26 January 1989), in *AAS* 81 (1989), 924, n. 5: "Ritengo poi opportuno ricordare a tutti gli operatori della giustizia, che, secondo la sana giurisprudenza della Rota Romana, si devono notificare nelle cause di nullità matrimoniali alla parte, che abbia rinunziato all'esercizio del diritto alla difesa, la formula del dubbio, ogni eventuale nuova domanda della parte avversa, nonché la sentenza definitiva."

95 Cf. Can. 1731, 1° of *CIC* 1917 demanded the consent from the other party before a judge could agree to change the terms of the controversy once the joinder of the issue has been fixed.

96 Cf. P.O. AKPOGHIRAN, *Mitis Iudex: Text and Commentary*, 212.

97 Cf. Can. 1622, 5°: "A judgement is null with a nullity which is simply remediable, if it is founded on a judicial act which is null and whose nullity has not been remedied in accordance with can. 1619."

98 Cf. Can. 1620, 4°: "A judgement is null with an irremediable nullity, if the trial took place without the judicial plea mentioned in can. 1501, or was not brought against some party as respondent."



correspondence between the doubt and the juridical sentence. It will also result in the violation of the right of defence in accord with the norm of can. 1620, 7° (cf. *DC* art. 270, 7°), because of a change in the object of the trial without the party's knowledge.[99] The parties have not been made aware of the allegation, and thus never got the opportunity to present any supporting or contrary evidence or to advance any arguments pertaining to the new grounds and they had no opportunity to defend themselves.[100] There are many Rotal decisions pronounced based on this violation of the right of defence.[101]

### 3.6 Is the Right to Request for a Session at Stake?

The most important part in the introductory phase of the trial is regarding the method of determining the formula of the doubt. According to the new can. 1676 §2 after *MIDI*, it is done by a decree of a judge after hearing the other party and the defender of the bond. Therefore, the joinder of issue, which is foreseen in the abrogated can. 1677 §2 before *MIDI*, does not exist anymore. L. Sabbarese also opines that this modification in the new canon has abolished the joinder of issue.[102] The convening of the party is not foreseen. According to the abrogated can. 1677 §2 and *DC* art. 126 §1, one or the other party can request a session for the joinder of the issue. This provision for the session does not exist in the new can. 1676 §2. Therefore, it can be said that this seems to affect the exercise of the right of defence.[103] This provision for the joinder of issue

99 Cf. E. DI BERNARDO, "Il nomen iuris tribuere", in *Quaderni Dello Studio Rotale* 21 (2011), 122: "Pertanto una sentenza emanata su un capo mai legittimamente concordato su istanza delle parti e del tutto ignorato da queste ultime nonchè dal difensore del vincolo rappresenta indubitabilmente 'la più grave espressione della violazione del principio di corrispondenza tra dubbio e pronuncia giudiziale'. Essa è insanabilmente nulla perché emessa *extra petita*, con violazione del diritto di difesa."

100 Cf. *Coram* STANKIEWICZ, 14 June 1980, in *Diritto Ecclesiastico* 91 (1980), 195, n. 13: "Quae cum ita, Iudex, qui suo arbitrio tempore proferendae sententiae causam petendi, id est caput nullitatis mutare audeat, haud dubie *ius defensionis* graviter laedit"; *Coram* BRUNO, 21 June 1995, *RRDecr.*, Vol. 13 (1995), 102, nn. 7, 10; *Coram* FUNGHINI, 24 July 1996, *RRDecr.*, Vol. 14 (1996), 164, n. 7; *Coram* BURKE, 22 May 1997, *RRDecr.*, Vol. 15 (1997), 93, n. 22; ID., 4 June 1998, *RRDecr.*, Vol. 16 (1998), 183, n. 5; C. GULLO, "Il diritto di difesa nelle varie fasi del processo matrimoniale", 49.

101 Cf. *Coram* MCKAY, 26 April 2007, B.Bis 52/2007, n. 4 (Unpublished); *Coram* AROKIARAJ, 16 April 2008, *RRDecr.*, Vol. 26 (2008), 29-33; *Coram* GRAULICH, 13 March 2013, B.Bis 57/2013 (Unpublished); *Coram* MCKAY, 13 January 2014, B.Bis 5/2014 (Unpublished); *Coram* SABLE, 25 July 2014, B.Bis 121/2014 (Unpublished); *Coram* GOMES, 12 June 2015, B.Bis 83/2015 (Unpublished); *Coram* MCKAY, 16 July 2015, B.Bis 104/2015 (Unpublished).

102 Cf. L. SABBARESE, *Canon Law. An Overview*, 268: "The disappearance of the joinder of issue could jeopardize the actual exercise of the right of defence, in particular for the respondent who intends to oppose the formulation of the doubt proposed by the actor or to introduce other grounds of nullity at this stage. Can. 1677 of the Code of Canon Law used to consider the possibility of the joinder of issue in §2 and the chance to challenge the decree within in ten days in §4."

103 Cf. *Ibid.*; M. DEL POZZO, "L'impatto della riforma sul diritto processuale vigente", 60-61: "L'atteggiamento dialogico e di confronto [...] sembra limitato all'impostazione del giudizio,

is a subjective right of the parties and also an essential element of the structure of the process.[104]

However, based on the general norm can. 1691 §3 and *RP* art. 6, the provision of can. 1513 §2 remains in force according to which "in more difficult cases, the parties are to be convened by the judge so as to agree on the questions to which the judgement must respond."[105] Therefore, we cannot also conclusively state that the provision for the right of defence at this stage is completely ruled out, though it may seem to undermine the right course of necessary action to adequately protect the right of defence of the parties involved.[106]

### 3.7 The Judge Changing the Formula of Doubt

According to can. 1514 and *DC* art. 136, a judge is prohibited from changing the formula of doubt *ex officio* once it is fixed and notified. They can, however, be validly altered if the following conditions are met: 1) the existence of a grave reason; 2) the request for change on the part of one of the parties, i.e., the plaintiff or the respondent, the defender of the bond and the promoter of justice; and 3) the hearing of the other party on the part of the judge (cf. can. 1514; *DC* art. 136).

According to the new can. 1676 §1, the judicial vicar fixes the ground and forms the constitution of the tribunal with the judge/judges and other officials. As a result, the judges, after being handed the case with a ground fixed by the judicial vicar, may find that they disagree with the judicial vicar's choice of grounds. Anticipating such a

la semplificazione procedimentale comporta invece la soppressione della richiesta dell'eventuale udienza di concordanza del dubbio. Viene così sottratta all'ambito dispositivo la discussione orale circa estremi e contenuto dell'accertamento. La convocazione delle parti non è prevista neppure *ex officio*"; F.S. Rea, *Delibazione di sentenze ecclesiastiche e riforma dei processi canonici di nullità matrimoniale. Dinamiche interne e proiezioni esterne nel 'Mitis Iudex Dominus Iesus' alla luce del 'giusto processo'*, 97-98: "Un tale *vulnus* non pare appartenere ad irrilevanti esercizi di stile quanto, piuttosto, urtare con parametri finalizzati a proteggere il diritto di difesa delle parti, in entrambe le sfere giuridiche, che è 'sia un diritto soggettivo dei coniugi che un elemento essenziale della struttura del processo', e le probabilità di giungere ad una decisione giusta, il più possibile partecipata e condivisa legate alla correttezza delle metodologie processuali utilizzate, le quali, lungi da essere un puro ed astratto formalismo, ma bisognose di integrarsi con altri e speculari aspetti di giustizia, costituiscono "sempre una risposta, non raramente tormentata e traumatica, alla tensione fondamentale che anima ogni momento della vita del diritto", ma non di esse meccanicamente, succube"; J.P. Beal, "Mitis Iudex Canons 1671-1682, 1688-1692: A Commentary", 467-538.

104 Cf. F. Daneels, "Uno studio di Ann Jacobs sul diritto di difesa nelle cause di nullità matrimoniale", in *Apollinaris* 73 (2000), 729.

105 Can. 1513 §2: "In causis autem difficilioribus partes convocandae sunt a iudice ad dubium vel dubia concordanda, quibus in sententia respondendum sit."

106 Cf. B.N. Ejeh, "'Mitis Iudex Dominus Iesus': obbiettivi, novità e alcune questioni", 39; F.S. Rea, *Delibazione di sentenze ecclesiastiche e riforma dei processi canonici di nullità matrimoniale. Dinamiche interne e proiezioni esterne nel 'Mitis Iudex Dominus Iesus' alla luce del 'giusto processo'*, 93-94.



disagreement, a judicial vicar from the United States inquired of the Pontifical Council for Legislative Text whether a judge once constituted, was free to change the grounds established by the judicial vicar. On 26 November 2015, the Council replied privately. The response reads:

> While the new can. 1676 regards cases for the declaration of nullity of marriage, cann. 1513 and 1514 regard the ordinary contentious trial and are not affected by the changes in the canons concerning special process, i.e., marriage cases. While the judicial vicar decrees the initial doubt in marriage nullity cases, the faculty of the judge to change the doubt or add another is not affected by the modification introduced with the MP *Mitis Iudex*.[107]

Therefore, although the judge can change the grounds in the course of the trial, he can do so validly after hearing the party or at the request of the party for grave reasons. Therefore, the judge is to consult the party if he wants to change the ground or add another ground in the course of the trial. Therefore, the clarification has emphasized the essential requirement of hearing the party before making the change, and thus protected the right of defence of the party. If the judge changes or adds to the ground without the consent or the knowledge of the party, it will lead to the nullity of the sentence based on the ground *extra vel ultra petita* in accord with the norm of can. 1620, 4° (cf. *DC* art. 270, 4°)[108] and due to the violation of the respondent's right of defence in accord with the norm of can. 1620, 7° (cf. *DC* art. 270, 7°).[109]

107 Pontificium Consilium De Legum Textibus, Private Response (26 November 2015), Prot. N. 15210/2015 (unpublished); cf. J.P. Beal, "The Ordinary Process According to *Mitis Iudex*: Challenges to Our 'Comfort Zone'", 181.

108 Can. 1620, 4°: "A judgement is null with an irremediable nullity, if the trial took place without the judicial plea mentioned in can. 1501, or was not brought against some party as respondent"; Cf. *Coram* Arokiaraj, 16 April 2008, 31, n. 4. "Itaque si iudicium factum est sine legitma iudiciali petitione, sententia nullitate insanabili infecta declaranda est."

109 Can. 1620, 7°: "A judgement is null with an irremediable nullity, if the right of defence was denied to one or other party"; Cf. C. Gullo, "Il diritto di difesa nelle varie fasi del processo matrimoniale", in *Il diritto alla difesa nell'ordinamento canonico. Atti del XIX congresso canonistico Gallipoli – Settembre, 1987* (Studi Giuridici 18), LEV, Vatican City 1988, 49; *Coram* Burke, 4 June 1998, 183, n. 5: "Partes enim ius habent ut audiantur de mutatione causae petendi. Iudex , qui suo arbitrio tempore proferendae sententiae caput nullitatis mutet, haud dubie ius defensionis graviter laedit; ac sententia, ob hoc violatum ius partium, nullitate laborat". The judgement will become null due to the change in the object of the trial without the party's knowledge and such a change deprives the party of the opportunity to know the allegation, present supporting or contrarty evidence or advance any arguments pertaining to the new grounds.

## 4. The Right to be Assisted by the Advocates

The *CIC* 1983 indicates that the Christian faithful have a right to advocacy (cf. can. 1481). The assistance of the advocate is a precious help for the party.[110] In marriage nullity cases this is one of the forms of the right of defence.[111] Dalla Torre observes, "the right of defence primarily means the technical defence, i.e., a right to be assisted by advocates in the course of the trial."[112] The right to defend what one has at stake in a trial manifests itself throughout the process[113] and one of them entails the right to be represented and assisted.[114] In order for the parties to be able to participate effectively in a marriage nullity process, they need to understand what a declaration of nullity is, what effect a declaration of nullity will have in their lives, how the process for ascertaining nullity works, what grounds might be applicable to their marriage case, and what kinds of proofs are required.[115] Most parties do not have such knowledge. Thus, in the marriage nullity process, the plaintiff and the respondent may be aided by an advocate who is an expert in law[116] to understand the process as well as to participate and exercise their right of defence.[117] Therefore, the right of defence includes the right to legal aid through an advocate.[118] As Pius XII at the inauguration of new judicial year (1944) of Roman Rota recalled:

> Advocates assist their client in drawing up the introductory petition of the case, in rightly determining the issue and the basis of the controversy, in bringing out the decisive points of the fact which is in issue; they indicate to the client what proofs to adduce, what documents to present; suggest what testimony to bring out at the trial; what points are essential in the depositions of the witnesses; in the course of the trial he helps evaluate rightly the exceptions and adverse arguments and to refute them: in a word, he gathers and gives effect to everything that can be alleged in favour of the client's contention.[119]

This implies that the advocate has a responsibility in guiding and assisting the respondent and the plaintiff in exercising their right of defence, to discover the truth and arrive at justice.[120] His assistance will facilitate the exercise of the rights of the parties by removing all the obstacles, which can impede their exercise of the right of defence.[121] Hence, it is the requirement of the justice that the parties in a contentious trial be assisted with technical help in matters regarding their rights of defence.[122] Moneta observes that in contentious cases like matrimonial nullity cases, "technical assistance by an advocate construct an essential component for the appropriate exercise of the right of defence."[123] Gullo observes, "the right of defence would be violated if a party was not granted an advocate whom the party chose and asked for and who had the necessary qualities to serve effectively as an advocate in an ecclesiastical court."[124] Therefore, advocacy and right of defence go hand in hand.[125]

110 L. Sabbarese (ed.), *Sistema matrimoniale canonico in synodo*, Urbaniana University Press, Vatican City 2015, 99.

111 Cf. K.E. McKenna, *For the Defence: The Work of Some Nineteenth Century American Canonists in the Protection of Rights*, Wilson & Lafleur Limitée, Montrèal 2014, 6.

112 G. Dalla Torre, "Qualche riflessione su processo canonico e principio del 'giusto processo'", in J. Kowal – J. Llobell (eds), *Iustitia et iudicium. Studi di diritto matrimoniale e processuale canonico in onore di Antoni Stankiewicz* (Studi Giuridici 89), Vol. 3, LEV, Vatican City 2010, 1303; cf. cann. 1481-1490.

113 Cf. J.M. Serrano Ruiz, "La querela di nullità della sentenza: Spunti per una rinnovata riflessione", in *Quaestiones selectae. De re matrimoniali ac processuali* (Annales 6), LEV, Vatican City 2018, 279: "Il diritto di difesa é una realtà dinamica che si prolunga per tutta la vicenda procedurale e che deve essere presente e, se del caso, valutato nel momento decisivo della vicenda procedurale."

114 Cf. W.L. Daniel, "The Publication of the Definitive Sentence", in *Studia Canonica* 42 (2008), 412.

115 Cf. L. Robitaille, "Through the Lens of *Dignitas Connubii*: The Judge's Active Role in Marriage Nullity Cases", in *Studia Canonica* 40 (2006), 155.

116 Cf. Cann. 1481, 1677 §1 (*DC* art. 101 §1).

117 Cf. E. Colombo, "Avvocato: diritti e doveri nella fase istruttoria", in *L'istruttoria nel processo di nullità matrimoniale* (Studi Giuridici 108), LEV, Vatican City 2014, 111; K. Lüdicke – R.E. Jenkins, *Dignitas Connubii: Norms and Commentary*, 180.

118 Cf. A. Giarda, *Avviso di Procedimento e Diritto di Difesa*, Giuffrè, Milan 1979, 1.

119 Pius XII, Allocution to the Roman Rota (2 October 1944), in *AAS* 36 (1944), 284: "L'avvocato assiste il suo cliente nel formulare il libello introduttorio della causa, nel determinare rettamente l'oggetto e il fondamento della controversia, nel mettere in rilievo i punti decisivi del fatto da giudicare; gli indica le prove da addurre, i documenti da esibire; gli suggerisce quali testimoni siano da indurre in giudizio, quali punti nelle deposizioni dei testi siano perentori; durante il processo lo aiuta a valutare giustamente le eccezioni e gli argomenti contrari e a confutarli: in una parola, raccoglie e fa valere tutto ciò che può essere allegato in favore della domanda del suo patrocinato"; cf. W.H. Woestman (ed.), *Papal Allocutions to the Roman Rota 1939-1994*, Theological Publications in India, Bangalore 2003, 27; A. Brasca, "Riflessione sul ruolo e sulla missione dell'avvocato nei giudizi di nullità matrimoniale", in *Studi in onore di Carlo Gullo* (Annales 4), Vol. 3, LEV, Vatican City 2017, 639.

120 Cf. J. Llobell, "Avvocati e procuratori nel processo canonico di nullità matrimoniale", in *Apollinaris* 61 (1998), 779-806; Id., "I patroni stabili e i diritti doveri degli avvocati", in *Ius Ecclesiae* 13 (2001), 71-91.

121 Cf. G. Dalla Torre, "Qualche riflessione su processo canonico e principio del 'giusto processo'", 1303.

122 Cf. J. Llobell, *I processi matrimoniali nella chiesa*, 182.

123 P. Moneta, "Il diritto alla difesa tecnica nel processo matrimoniale canonico", in *Il diritto di difesa nel processo matrimoniale canonico* (Studi Giuridici 72), LEV, Vatican City 2006, 87.

124 C. Gullo, "Il diritto di difesa nelle varie fasi del processo matrimoniale", 37: "Il diritto della parte se, ad essa che lo richieda, venga negata la facoltà di costituire un patrone di fiducia, che abbia i requisiti per svolgere questa funzione di fronte ai tribunali ecclesiastici."

125 Cf. F.G. Morrisey, "The advocate for the Accused and the right of defence", in P. Dugan (ed.), *Advocacy Vademecum*, Gratianus Series, Wilson & Lafleur Limitée, Montrèal 2006, 5.

## Conclusion

The *ius vigens* protects the rights of all the faithful in the process. Can. 221 states:

> Can. 221 §§1-2 read:
>
> §1 Christ's faithful may lawfully vindicate and defend the rights they enjoy in the Church before the competent ecclesiastical forum in accordance with the law.
>
> §2 If any members of Christ's faithful are summoned to trial by the competent authority, they have the right to be judged according to the provisions of the law, to be applied with equity.

The Code envisages several rights for the parties in the introductory phase of the process and we have shed light on them in this article. The tribunal personnel should be apprised of these canonical provisions for the various rights and use them during the trial. *Ignorantia iudicis, calamitas innocentis*. The well-informed judge must apply these provisions for the exercise of the rights of the parties which will help in turn foster the effective functioning of tribunals and administering justice. The procedural provisions in the introductory phase of matrimonial nullity cases should not be treated as an empty legal formality, but should be seen from the significant and phenomenal values it upholds, such as the right of defence. Any violation or denial of these rights will not only the licitness but also the validity of marriage. They are so sacrosanct that the judge cannot take them for granted and neglect them.